Re Datuk Dr Kamal bin Mat Salih; ex parte Affin Bank Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D8–29–4698 OF 2005
KANG HWEE GEE J
26 FEBRUARY 2008

Bankruptcy — Notice — Setting aside — Appeal against refusal of SAR to set aside bankruptcy notice — Whether judgment sum may be modified by payments before issuance of bankruptcy notice — Whether sufficient for debtor to merely challenge as incorrect sum set out in bankruptcy notice without condescending to any particulars — Whether time given by creditor to debtor to pay off judgment debt would estop creditor from claiming balance judgment sum

Judgment in default of appearance was obtained by the judgment creditor ('the creditor') against the judgment debtor ('the debtor') for a sum of RM42m. The parties thereafter agreed for the debtor to have some time to pay off the debt. He was however to pledge additional shares as collateral to cover the judgment sum owed. The creditor subsequently disposed of the debtor's shares and issued a bankruptcy notice for the remaining judgment debt of RM12,444,316.66. The debtor applied to set aside the bankruptcy notice claiming, inter alia, that the creditor should be estopped from issuing the bankruptcy notice. The senior assistant registrar ('SAR') dismissed the debtor's application but allowed a stay of further proceedings pending the debtor's appeal to set aside the bankruptcy notice. The debtor appealed to the judge against the dismissal of his application to set aside the bankruptcy notice and the creditor appealed against the SAR's decision to stay further proceedings. At the outset of the appeal, the High Court judge opined that the issues in the creditor's appeal could effectively be disposed of in the appeal by the judgment debtor.

Held, dismissing the debtor's appeal with costs and dismissing the creditor's appeal:

(1) In complex bankruptcy proceedings, such as in the instant one, the judgment sum may be modified by some payments before the issuance of the bankruptcy notice. The law is well settled that a bankruptcy notice can be issued on the sum which takes into consideration any prior part payment before the issuance of the notice (see para 12); *Tan Chong Keat v Asia Commercial Finance (M) Bhd* [2000] 3 MLJ 248 referred.

(2) In the instant case, it was clear that the creditor had given the debtor the indulgence of some time to pay the judgment debt in the process of which he was to deposit his shares as security. If he failed to pay off the judgment debt, his shares would be sold to offset the sum owed. The indulgence was certainly not a new agreement entered into between the creditor and the debtor on the payment of the judgment sum already obtained by the creditor. The submission that the creditor was estopped from claiming the balance of the judgment sum was therefore untenable (see para 13).

(3) It was insufficient for the judgment debtor to challenge the figures set out in the bankruptcy notice by merely asserting that the figures were incorrect without condescending to any particulars to show what the correct amount should be (see para 14).

Editorial note: The decision rendered the creditor's appeal academic. It was thus struck off with no order as to costs (see para 15).

[Bahasa Malaysia summary

Penghakiman ingkar kehadiran diperoleh oleh pemiutang penghakiman ('pemiutang') terhadap penghutang penghakiman ('penghutang') untuk jumlah RM42j. Pihak-pihak selepas itu bersetuju agar penghutang diberi masa untuk membayar hutang tersebut. Dia walau bagaimanapun hendaklah mencagarkan saham-saham tambahan sebagai kolateral untuk melindungi jumlah penghakiman yang perlu dibayar. Pemiutang berikutan itu telah menjual saham-saham penghutang dan mengeluarkan notis kebankrapan untuk baki hutang penghakiman sejumlah RM12,444,316.66. Penghutang memohon untuk mengenepikan notis kebankrapan tersebut dengan mendakwa, antara lain, bahawa penghutang patut diestopkan daripada mengeluarkan notis kebankrapan tersebut. Penolong kanan pendaftar ('PKP') telah menolak permohonan penghutang tetapi telah membenarkan penggantungan prosiding seterusnya sementara menunggu rayuan penghutang untuk mengenepikan notis kebankrapan tersebut. Penghutang telah merayu kepada hakim terhadap penolakan permohonannya untuk mengenepikan notis kebankrapan tersebut dan pemiutang telah merayu terhadap keputusan PKP untuk menggantung prosiding seterusnya. Pada awal rayuan, hakim Mahkamah Tinggi berpendapat bahawa isu-isu dalam rayuan pemiutang boleh diselesaikan secara berkesan dalam rayuan oleh penghutang penghakiman.

Diputuskan, menolak rayuan penghutang dengan kos dan menolak rayuan pemiutang:

(1) Dalam prosiding kebankrapan yang kompleks, seperti dalam kes ini,

jumlah penghakiman boleh diubah dengan beberapa bayaran sebelum pengeluaran notis kebankrapan. Undang-undang adalah tetap bahawa notis kebankrapan boleh dikeluarkan untuk jumlah yang telah dipertimbangkan apa-apa sebahagian bayaran terdahulu sebelum pengeluaran notis tersebut (lihat perenggan 12); *Tan Chong Keat v Asia Commercial Finance (M) Bhd* [2000] 3 MLJ 248 diikut.

(2) Dalam kes ini, adalah jelas bahawa pemiutang telah memberikan penghutang kelonggaran masa untuk membayar hutang penghakiman dalam proses yang mana dia perlu mendepositkan saham-sahamnya sebagai cagaran. Jika dia gagal untuk membayar hutang penghakiman tersebut, saham-sahamnya akan dijual untuk mengimbangi jumlah yang perlu dibayar. Kelonggaran tersebut bukan perjanjian baru yang dimasuki antara pemiutang dan penghutang atas bayaran jumlah penghakiman yang telahpun diperoleh oleh pemiutang. Penghujahan bahawa pemiutang diestopkan daripada menuntut baki jumlah penghakiman oleh itu tidak dapat dipertahankan (lihat perenggan 13).

(3) Ia adalah tidak mencukupi untuk penghutang penghakiman mencabar angka-angka yang dinyatakan dalam notis kebankrapan dengan hanya menegaskan bahawa angka-angka tersebut adalah salah tanpa menunjukkan apa-apa butiran jumlah sebenar yang betul (lihat perenggan 14).

Nota editorial: Keputusan tersebut menjadikan rayuan pemiutang akademik. Oleh itu ia dibatalkan tanpa apa-apa perintah terhadap kos (lihat perenggan 15).]

Notes

For cases on setting aside of bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2582–2621.

Cases referred to

Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd [1992] 1 AMR 40:12; [1992] 2 MLJ 344 (refd)

Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals [1989] 2 MLJ 142 (refd)

Tan Chong Keat v Asia Commercial Finance (M) Bhd [2000] 3 MLJ 248 (refd)

S Nantha Balan (Tricia with him) (Zul Rafique & Partners) for the judgment creditor.

Harikannan Ragavan (R Sunitha with him) (Jayadeep Hari & Jamil) for the judgment debtor.

Kang Hwee Gee J: This is my oral judgment (ex tempore):

[1] This is an appeal by:

(i) the judgment debtor against the dismissal of the judgment debtor's application to set aside the bankruptcy notice (encl 16);

A (ii) the judgment creditor against the decision of the senior assistant registrar ('SAR') in allowing the judgment debtor's application for a stay of the bankruptcy proceeding pending an appeal to the judge in chambers (encl 26).

B THE GROUNDS AS SUBMITTED BY COUNSEL FOR THE JUDGMENT DEBTOR ARE AS FOLLOWS

[2] The SAR had allowed the application for the stay on the basis that there would be no prejudice to the judgment creditor. This was said orally when C the decision was made. The grounds given by the judgment debtor in making the application for a stay are that the SAR had errred in her decision in refusing to set aside the bankruptcy notice and that because of his status as a member of various government committees ie as adviser to the National Implementation Task Force, a bankruptcy order against him would cause D irreparable and or irreversible damage to his reputation. We submit that the first ground advanced by the judgment debtor goes to the issues relating to the merits of the appeal that is pending before the judge in chambers which is not a relevant factor for the purposes of deciding whether this is a special circumstance.

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[3] We submit that insofar as the reputation of the judgment debtor is concerned, this is not a special circumstance but rather this is an ordinary and natural circumstance following from any bankruptcy proceedings against a debtor who has failed to pay the judgment debt which in this case amounts F to RM12,444,316.66.

[4] The judgment debtor had applied to set aside the bankruptcy notice and failed. In the meantime the petitioner proceeded to file the creditor's petition. The SAR then postponed the creditor's petition pending the hearing G of the judgment debtor's application to set aside the issuance of the creditor's petition. The SAR dismissed the judgment debtor's application but allowed a stay of further proceedings pending the judgment debtor's appeal to set aside the bankruptcy notice (encl 16).

H Court: *The disputes on both encl 16 and encl 26 can be effectively disposed of by the appeal by the judgment debtor on the SAR's decision dated 23 August 2006 dismissing the judgment debtor's application to set aside the bankruptcy notice (encl 16).*

I ENCLOSURE 16

Submission by counsel for the judgment debtor/appellant: (verbatim)

[5] The judgment creditor is estopped from issuing the bankruptcy notice.

After the judgment in default of appearance was obtained against the judgment debtor the parties had entered into negotiations and the parties are agreed that the judgment debtor would pledge additional shares to cover the judgment sum owed as collateral. The judgment creditor accepted these shares without reserving their rights to enforce the judgment in default. See (i) exh 'K-2' — letter from the judgment debtor to the judgment creditor forwarding the shares as collateral; and (ii) exh 'K-3' — letter from the judgment creditor to the judgment debtor accepting the shares but asking the judgment debtor to sign a memorandum of deposit of shares. With the deposit of shares the judgment creditor's recourse can no longer be based on the judgment obtained for a sum of RM42m (judgment notice was for the sum of RM12,444,316.66 after taking into account proceeds from the sale of pledged shares). See *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344; [1992] 1 AMR 12 per Gunn Chit Tuan SCJ at Held (of AMR):

> Section 3(2)(ii) of the Bankruptcy Act 1967 (the 1967 Act) did not apply in this case as the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment (as required by s 3(1)(i) of the 1967 Act) but was in accordance with the terms of an agreement subsequently entered by the parties. Therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the 1967 Act.

[6] Alternatively if the judgment creditor is allowed to proceed based on the judgment in default, then the amount stated on the bankruptcy notice is excessive. The interest element chargeable was wrongly calculated. The judgment in default was entered on 22 January 2001. From December 2003 onwards up to 15 March 2005 the judgment creditor had been selling off the pledged shares on a periodic basis. As and when the shares were sold the proceeds of the sales must be deducted from the judgment sum which had included the interest accrued up to the date the shares were sold. But in this case as the batches of shares were sold on different dates as stated in exh 'K-1' no such deductions were made. What the judgment creditor had done was to calculate interest from the judgment date until the date the bankruptcy notice was issued and therefrom deducted all the shares sold during the period in one go. There is therefore discrepancy in the amount stated in the bankruptcy notice to the disadvantage of the judgment debtor. See *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142 per Harun SCJ at Held (1):

> For a bankruptcy notice to be valid it should state the exact amount due at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make calculations or enquiries.

Submission by counsel for the judgment creditor: (verbatim)

[7] No estoppel applies against the judgment creditor because the acceptance of the pledged shares was merely an indulgence given by the judgment creditor to the judgment debtor pending the settlement of all outstanding debts under the judgment. See exh 'AG-4' of encl 8 — letter is in relation to the pledge of shares by judgment debtor and it makes reference to the pledge of shares and dateline of 31 March 2004 for the settlement of all outstanding judgment sums. This letter dated 28 August 2003 precedes the exh 'K-2' letter (the first letter written by judgment debtor dated 24 September 2003).

See exh 'AG-5' — letter dated 24 March 2004 from judgment creditor to judgment debtor referring to the judgment creditor's letter dated 28 August 2003 asking for full amount to be settled.

[8] Estoppel was raised only after bankruptcy proceedings commenced. After the pledgor of the shares had failed in their injunction application to restrain the judgment creditor from disposing of the pledged shares and shortly before the transaction between the judgment creditor and the purchaser was due to be completed, judgment debtor wrote to the judgment creditor by letter dated 4 August 2005 encl 8 exh 'AG-7' and asked for a redemption statement showing a statement of his outstanding indebtedness to the bank with respect to the amount owing on the judgment sum. (Clear admission of indebtedness.) The judgment creditor replied by letter dated 9 August 2005, see exh 'AG-8' of encl 8, setting out the amount outstanding calculated as at 5 August 2005. The judgment debtor did not challenge the redemption statement (the letter dated 9 August 2005). No response from the judgment debtor. Thereafter the sale from the pledged shares were completed and the judgment creditor wrote to the judgment debtor by letter dated 14 November 2005 and gave a statement of account of the outstanding balance as of 31 October 2005 taking into account the sale of the shares and reserving the right to proceed the bankruptcy or other forms of execution in relation to the amount outstanding under the judgment sum. Letter exh 'AG-9' encl 8. There was no response by the judgment debtor to this letter by the judgment creditor.

[9] The bankruptcy notice sets out the judgment sum and the interest which runs from 23 January 2001 until the 5 August 2005 and includes all computations with respect to sums owed as at the date of the bankruptcy notice including the sale of shares deposited by the judgment debtor thus stating a fixed sum of RM12,444,316.66 as at the date of the bankruptcy notice 30 November 2005 in compliance with the illustration prescribed in the Supreme Court case of *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* at p 143.

Reply by counsel for the judgment debtor/appellant: (verbatim)

[10] Estoppel point — distinguish *Tan Chong Keat v Asia Commercial Finance (M) Bhd* [2000] 3 MLJ 248 at p 253: there the intention of the parties was not to be construed as a bar to the creditor's demand whereas in our case at the time the additional securities were given there was no such express provision. Here additional securities were given to forestall execution among other reasons.

[11] The *Ghazali* case is wider than contended by my learned friend because here there has been sale of shares which alters the principal sum due and owing and therefore the simple tabulation in *Ghazali* case is insufficient to show what is required of the judgment debtor. Further the case actually stipulates that interest had to be calculated as at the date of the bankruptcy notice. 5 August 2005 cannot be the date of the sale of the shares because it is not disputed that in this case the shares were sold in batches.

FINDINGS AND DECISION

On the estoppel point

[12] In a straightforward bankruptcy proceeding all that the judgment creditor has to do is to issue a bankruptcy notice stating the amount due from the judgment sum obtained from the order of the court. In more complex case such as the present one can expect the judgment sum to be modified by some payments before the issuance of the bankruptcy notice. The law is well settled that a bankruptcy notice can be issued on the sum which takes into consideration any prior part payment before the issuance of the notice. See *Tan Chong Keat v Asia Commercial Finance (M) Bhd* at p 253 per Siti Norma Yaakob JCA:

> As a creditor it stands to reason that the respondent must be assured of its right to claim the balance of the judgment sum due from the appellant. That we say has been taken care of by cl 1 of the second settlement agreement wherein the appellant had agreed to the respondent withholding from enforcing the judgment sum for a year from the date of the first settlement agreement but after that period, the respondent was free to take any action it deemed fit to recover the balance of the judgment sum. As such during the time bar of one year, the respondent's right to enforce payment of the judgment sum had been in abeyance but once the time bar has expired, his right to go against the appellant personally is revived. Under these circumstances, the appellant cannot take any objection to the issue of the bankruptcy notice by relying on the existence of the two settlement agreements to say that he has a counterclaim against the amount demanded in the bankruptcy notice. Neither can the appellant claim that the respondent is estopped from issuing the bankruptcy notice as by agreement the appellant had consented to

effect part settlement within a year and after that period the respondent was free to take any action against the appellant to recover the balance of the judgment sum.

[13] In the instant case it is clear that what the judgment creditor had proceeded to do after obtaining judgment from the High Court was to give the judgment debtor the indulgence to pay the judgment by allowing him time to pay the judgment debt in the process of which he was to deposit his shares in Sesama Medical College Management Sdn Bhd as security failing which the shares would be sold to offset the sum owed. The indulgence was certainly not a new agreement entered into between the judgment creditor and the judgment debtor on the payment of the judgment sum already obtained by the judgment creditor. The submission that the judgment creditor is now estopped from claiming the balance of the judgment sum is therefore untenable.

On the irregularity of the bankruptcy notice point

[14] All that the judgment creditor needs to show on the bankruptcy notice is the exact amount that it is claiming from the judgment debtor arising from the judgment that it obtained from the High Court less whatever amount that had been paid by the judgment debtor as it had done in the instant case in encl 1. By doing so it had complied with the requirement as set out in the *Ghazali* case the purpose of which was to bring to the notice of the judgment debtor the amount he owed so as to enable him to know how much he would have to pay on the notice. It is insufficient for the judgment debtor to challenge the figures set out in the notice by merely making an assertion that they were incorrect without condescending to any particulars to show what should be the correct amount as the judgment debtor had done in this case.

[15] For the foregoing reasons the judgment debtor's appeal encl 16 is dismissed with costs.The judgment creditor's appeal in encl 26 has been rendered academic by my decision in encl 16 and should be struck off with no order as to costs.

Debtor's appeal dismissed with costs. Creditor's appeal dismissed.

Reported by Andrew Christopher Simon